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In the Supreme Court of the United States

OCTOBER TERM, 1969

FRANK ONESTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Frank Onesti, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

Opinion of the court below

On May 29, 1969 the court below affirmed the sentence of trial court. Appeal was taken only from the sentence portion of the judgment of the trial court.

The Opinion is not reported, but is appended hereto as Appendix A. The order denying a re-hearing on June 17, 1969 is appended hereto as Appendix B.

Jurisdictional statement

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Sec. 1254(1). On July 22, 1969 Mr. Justice Marshall granted an extension of time to file this Petition to and including August 5, 1969.

Question Presented

May the trial court base the sentence imposed upon defendant by a consideration of impermissible matter?

Statement of Facts

Arthur Smith, a letter carrier, Guy and Frank Onesti, twin brothers were charged with conspiracy to steal a credit card from the mails (Tr. 2). Smith and Guy Onesti pled guilty (Tr. 6). Frank Onesti was tried by the court and found guilty (Tr. 10-11).

Smith was placed on three years probation (Tr. 111). Guy and Frank Onesti were each sentenced to a year (Tr. 113). Only Frank Onesti appealed his sentence.

The Sentencing Procedure

The attorney for Arthur Smith advised the court that Smith was 30 years of age, married, and had one child, that he cooperated with the government and had testified in the case; that he had lost his job with the Post Office and was employed with an engineering company in Mt. Vernon, Illinois (Tr. 91-92).

Counsel for Guy and Frank Onesti advised the court that they were twins, 28 years of age and residents of the Melrose Park area for most of their lives, that until this occurrence they had been regularly employed since their high school days, that they were automobile mechanics and

had been operating a body shop in Melrose Park. Guy was married and had 4 children. Frank was married and had 2 children. It was pointed out that they had brought shame to themselves and their parents, both of whom were in court, and that the father had been employed for a good many years at the Diamond Motor Car Company and that theretofore they had enjoyed an excellent reputation in the community (Tr. 91-92).

The court inquired whether either Guy or Frank had done any business with Vito Lombardi. Frank stated that the only thing he did was to fix an automobile for Lombardi, that he did not know Lombardi personally. He did not have any discussion with Lombardi about credit cards (Tr. 96).

The court inquired, "What about Gust Koroveses?" Frank answered he did not know him, that he saw him once in his lifetime before, that he exchanged three or four words with him, and never talked to him about credit cards (Tr. 97).

The court asked Frank Onesti, "Do you know that he has been in trouble with credit card violations?", to which Frank Onesti answered that he had so heard (Tr. 98).

In answer to the court's inquiry as to what he did with all the credit cards, Frank Onesti stated that he had burned quite a number of them. "I got scared and I just disposed of them." (Tr. 98).

The court called upon the government attorney "to make any statement that you would like to make and any information that you would like to give in connection with this defendant." (Tr. 99). The government attorney stated that as to Arthur D. Smith, he had cooperated in the case and had testified.

"As to the Onestis, your Honor, I would point out that in an article which was recently published, it was stated that in Chicago, where, and I am quoting from the article, ' . . . where several banks began deluging metropolitan area citizens with unsolicited cards early last winter, losses traced to theft or fraud at one point averaged 4% of total sales. One bank got hit with $46,000 in fraudulent purchases on a single day; another, the First National Bank of Chicago had $5,703 — . . . had 5,703 cards on its black list . . .' —

Mr. Echeles: Well, I don't — if the court please, I apologize for interrupting but unless they relate to the Onesti defendants, all the Assistant United States Attorney —

Mr. Le Cesne: I am just making a general observation, your Honor.

The Court: Well, this is a serious matter —

Mr. Echeles: Yes, your Honor.

The Court: The use and theft of credit cards presents a serious problem to the banks, and so forth, and I am aware of that . . . " (Tr. 100-101).

The court invited the Asst. U. S. Attorney to advise him in a general way about a document given to the court by Mr. LeCesne which purported to be an "inventory of items seized." (Tr. 101-102).

"Mr. LeCesne: We have the testimony of the Onesti who took the stand at the trial, that he had used credit cards improperly and illegally and had purchased many items — this is in the record — for his personal use. Now, the name 'Lombardi' was mentioned in that trial —

The Court: I realize it was.[1]

Mr. LeCesne: And, your Honor, it is a fact that there is a current investigation involving one Lombardi who is the hub and I suggest that the Onestis are perhaps only one of the many spokes of that

[1] It was the court who brought up the name of Lombardi (Tr. 79-80).

> wheel, Lombardi is the principal. Now, how well they are acquainted with him I don't know. They say that they don't know him. But without going into any detail, and I don't know any detail about the card investigation, it is a fact, number one, that they know Lombardi, and, number two, that Lombardi is under current investigation . . . " (Tr. 102).

The United States Attorney then referred to matters which were in the record, that the Onestis used credit cards, that they induced a postman who was tempted by them and who was offered a consideration of $175 for which he furnished between 18 and 20 credit cards and that the credit cards which the postman had furnished "were credit cards, unsolicited, mailed to persons whom he was aware were deceased or removed from his route." (Tr. 102-103).

Mr. LeCesne advised the court that there were other credit cards found on the premises of the Onestis other than the cards which were secured from the mailman (Tr. 103-104), to which accusation counsel for the Onestis replied:

> "I am advised by Guy Onesti that when the United States Attorney, the Assistant United States Attorney, says that they were credit cards, that is not so. There was one credit card and Mr. Onesti advises me now, as he will advise the court, that that credit card came from Smith.
>
> "Frank Onesti has told the court now that all of the other credit cards were burned, destroyed, because of his fears and because of his apprehension. There was no other credit card.
>
> "Now, with respect to what the government says to this court in an amazing statement, without proof, without the slightest bit of evidence, that there were wholesale uses of those cards — it was quite simple,

and is quite simple, for the government to bring to this court the records of banks showing use of those credit cards abstracted by them.

"Failing that, your Honor, that kind of guess or surmise is unfair to the defendants in this proceeding; unfair to the defendants in this proceeding." (Tr. 105-106).

The court inquired of defendants why they had in their possession preprinted sets of Midwest Bank sales slips. The defendant Guy Onesti explained:

"At one time a gentleman came in, I had never seen him before, wishing to get his car fixed and he said that he had a credit card, a credit card that he wanted to run off on my machine and pay small amounts at a time with the credit card.

"He proceeded to run them off, but, your Honor, they were never put through, they were never used. I never put one of them credit cards through, your Honor. That was four or five months previous to when we were arrested.

The Court: Well, how about the preprinted set of Midwest Bank card slips on Credit Card 125510643 in the name of Donald Ryan? What were you doing with that?

Defendant Guy Onesti: Your Honor, I have no idea. I really don't know what that credit card was.

"I admitted to my use in the credit card and my brother admitted to his uses in the credit card.

"As far as Mr. Lombardi is concerned, we have never had any connection with anyone outside of legitimate people, your Honor.

"This man — in fact, the fact of the matter was that this man's car had been fixed, which he was supposed to pick up, and when he did come to pick it up, instead of being an insurance job, which he was supposed to

pay for, he approached us with a credit card to pay for it. It was to the extent of $350 or so. But we have never had any dealings with anyone other than honest people, your Honor." (Tr. 106-108).

The court inquired whether the sales slips were included in the inventory and the government attorney responded in the negative.

"The Court: Well, how do you connect these with these two defendants?

Mr. LeCesne: Well, this is part of the investigation that is going on.

The Court: Well, I am not interested in any other investigations except as to the evidence here." (Tr. 109-110).

The court inquired whether the defendants knew anything about the slips. Defendant Guy Onesti answered:

"Your Honor, what this looks like to me is the gentleman that had his car fixed, to me. You see, we did have the Midwest — or the First Card, installed in our place of business. We did do some cars, fixed some cars for people that had First Cards. Your Honor, we admit to our guilt in taking part in the conspiracy with our mailman and the fact that we did use cards, but we cannot admit to the fact that we were an operation or a ring. Frank and I have been honest people all our lives. We have had a good education and we have worked all our lives. I am sure that Mr. Smith has, too.

"It would certainly be a terrible thing if we — as it is now we have shamed our families. We all have people who depend on us. I believe that we have proven ourselves to be honest citizens in the previous — in the past, and, for one mistake, which I know could not happen again, your Honor, I beg your indulgence." (Tr. 110-111).

The Court placed defendant Smith on probation for three years. "Now, as to the other two defendants, if I were convinced that this was an isolated transaction that involved simply this one — transaction with the other co-defendant, in view of your prior record I would do with you what I have done with him, but I am not convinced of that in any sense of the word. I think that on the basis of the evidence that I heard in the trial plus the facts that have been presented here today to me, that you were not engaged in an isolated transaction. This theft of credit cards on a wholesale basis and the use of them — and you gentlemen had no excuse to use them in the way that you did; you both had a legitimate place of business, apparently on the face of it, at least, a legitimate place of business, and you didn't actually need the money and there is no excuse, except the fact that you were engaged in an operation.

"On that basis, as to each one of you, I am going to sentence you to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year." (Tr. 112-113).

Reasons for Granting the Writ

During the sentencing procedure the court reviewed and considered impermissible matter as bearing upon the defendant. Although a sentencing judge may take into consideration other relevant information than the strict facts of the specific case in determining the proper sentence, *Williams* v. *New York*, 337 U.S. 241, 247, a judge may not consider impermissible matter in determining the sentence.

In this case Smith, the postman who stole from the mails and who pleaded guilty to the conspiracy was given probation. The petitioner, whose background was impeccable was sideswiped because the prosecution read to the judge a newspaper article which printed " . . . where several banks began deluging Metropolitan area citizens with unsolicited cards early last winter, losses traced to theft or fraud at one point averaged 4% of total sales. One bank got hit with $46,000.00 in fraudulent purchases on a single day. Another, The First National Bank of Chicago had . . . 5703 cards on its black list . . . " (Tr. 100).

It is petitioner's respectful contention that the judge here concluded from the colloquy at sentence time that he was of the belief that the defendant was engaged not in the isolated transaction indicated by the evidence, but in a whole series of operations (Tr. 112).

During the trial, the court asked the defendant whether a person by the name of Lombardi had done some work in his body shop and the defendant testified that Lombardi had an automobile repaired and that he used credit cards for the payment of bills, but that his shop did not receive credit from the bank because the credit cards were no good (Tr. 79-80). Again, at sentence time, the court inquired whether Guy or Frank Onesti had done any business

with Vito Lombardi (Tr. 96-97). The defendant said the only thing he did was fix an automobile for Lombardi and that he did not know Lombardi personally. The court inquired, "What about Gust Koroveses?", to which the defendant answered that he did not know such a person, had only seen him once before in his life and had exchanged three or four words and had never talked to him about credit cards (Tr. 97-98). The court inquired whether the defendant knew that Koroveses had been in trouble with credit card violations, to which defendant answered that he had so heard (Tr. 98).

The prosecutor stated that there was a published article in which it was printed that " . . . where several banks began deluging metropolitan area citizens with unsolicited cards early last winter, losses traced to theft or fraud at one point averaged 4% of total sales. One bank got hit with $46,000 in fraudulent purchases on a single day; another, the First National Bank of Chicago, had . . . 5,703 cards on its black list . . . " (Tr. 100).

With respect to the name "Lombardi", the prosecutor advised the court that there was "a current investigation involving one Lombardi who is the hub and I *suggest* that the Onestis are *perhaps* only one of the many spokes of that wheel, Lombardi is the principal. Now, how well they are acquainted with him I don't know. They say they don't know him. But without going into detail about the card investigation, it is a fact, number one, that they know Lombardi, and, number two, that Lombardi is under current investigation." (Tr. 102).

Without any proof in the record that the defendant knew Lombardi other than as a customer who had a car repaired for which neither the defendant nor his brother received any reimbursement because the charge was re-

fused payment by the bank, the Asst. U. S. Attorney *suggested* that the Onestis were involved with Lombardi, "perhaps" in the operation of a credit card ring; or, in the words of the prosecutor, that the Onestis "are perhaps only one of the many spokes of that wheel, Lombardi is the principal." Thus, the judge was led by the government to the improper conclusion on the basis of "the facts that have been presented here today to me (*i.e.*, the proceedings at sentence time) that you were not engaged in an isolated transaction. This theft of credit cards on a wholesale basis and the use of them — and you gentlemen had no excuse to use them in the way that you did; you both had a legitimate place of business, apparently on the face of it, at least, a legitimate place of business, and you didn't actually need the money and there is no excuse, except the fact that you were engaged in an operation. On that basis, as to each one of you, I am going to sentence you to the custody of the Attorney General . . . for a period of one year." (Tr. 112-113).

We respectfully submit that the unsupported advices, suggestions and guesses by the prosecutor at sentence time led the judge to believing that the defendant was part of a large operation. And, there is no question but that the judge imposed the sentence of a year instead of granting probation, because of these impermissible considerations.

Conclusion

For the foregoing reasons, petitioner prays the writ may be granted to review the sentence procedure and the sentence imposed.

Respectfully submitted,

JULIUS LUCIUS ECHELES,
Attorney for Petitioner.

APPENDIX

APPENDIX A

May 29, 1969

Before HASTINGS, *Senior Circuit Judge,* FAIRCHILD and CUMMINGS, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* The sole question on this appeal is whether the trial court, in determining sentence, considered impermissible evidence and as a result reached unwarranted conclusions bearing upon defendant's sentence.

A three-count indictment was filed May 2, 1968 in the United States District Court for the Northern District of Illinois, Honorable Bernard M. Decker, Judge presiding.

In Count 1, Arthur D. Smith, a government postal carrier, Frank E. Onesti (defendant in the instant case) and his brother Guy A. Onesti, pursuant to 18 U.S.C.A. § 371, were charged with conspiring to violate 18 U.S.C.A. §§ 1702 and 1709 in that they stole a letter containing a credit card.

In Count 2, Arthur D. Smith alone was charged with embezzling a letter from the mails on or about October 18, 1967, addressed to Robert Marotta, Melrose Park, in violation of 18 U.S.C.A. § 1709.

In Count 3, the indictment charged that Frank E. Onesti (defendant) and Guy A. Onesti on or about October 18, 1967 took a letter addressed to Robert Marotta, Melrose Park, which was in the custody of a mail carrier before it had been delivered to the addressee, in violation of 18 U.S.C.A. § 1702.

On May 10, 1968, Arthur D. Smith entered a plea of guilty to Counts 1 and 2. He was placed on three years probation by Judge Decker. On the same date, Guy A. Onesti entered a plea of guilty to Count 3, the substantive count. He was sentenced to a term of one year in the custody of the Attorney General. He began service of that sentence. The conspiracy count was thereafter dismissed against Guy.

Defendant Frank E. Onesti entered a plea of not guilty to Counts 1 and 3. Thereafter, he was found guilty on both counts following a bench trial commenced on July 15, 1968 before Judge Decker. On September 13, 1968, defendant was sentenced to a term of one year in the custody of the Attorney General by Judge Decker. He has been at large on bail pending this appeal.

Defendant was represented by experienced counsel throughout the proceeding in the trial court and on this appeal. No error is charged in the trial nor is the validity of the judgment of guilt on Counts 1 and 3 questioned. Defendant seeks only to have his sentence vacated and the cause remanded to the trial court for a reconsideration of the sentence.

We need only make a general reference to the occurrence established by the evidence at the trial. Persons who had never received credit cards were billed for merchandise purchased with such cards. Such cards had been mailed to persons living on Smith's mail route, including Robert Marotta, who had since moved away. Smith embezzled the credit cards and subsequently sold a number of them to defendant and his brother Guy under an arrangement made with them. Defendant and Guy owned and operated the Lake Auto Body Shop in Melrose Park, Illinois. Both

executed written statements to the postal inspectors. Defendant admitted the purchase of several of such credit cards from Smith and that his brother purchased others from Smith, all taken from the mails. He admitted the fraudulent use of one such card for his personal needs, including the purchase of a watch costing $275 and a television set. Also, the fraudulent use of three other cards to charge repairs at his body shop to an automobile of one Vito Lombardi. There was corroborative testimony from Smith and a postal inspector. Defendant testified.

Defendant's counsel, on oral argument, concedes that the pre-sentence report was made available for inspection.

We have read the colloquy between Judge Decker, counsel for defendant, the government and the three individuals concerned. All were given an ample opportunity to speak, as was their attorney, and no complaint is made on that score. The trial court was primarily interested in knowing whether this was an isolated transaction or whether the Onesti brothers had engaged in an extensive scheme to fraudulently use credit cards. The trial evidence established they had purchased a total of 18 to 20 cards taken from the mail by Smith. At the time of the arrest and pursuant to a proper search warrant incriminating evidence was found on defendant's body shop premises pointing to an established plan to participate in an extensive scheme to fraudulently use stolen credit cards.

Our examination of the relevant record leads us to conclude that the distinguished trial judge properly considered evidence other than that pertaining to the offense of October 18, 1967. The record supports the conclusion that defendant was involved in a series of fraudulent transactions with stolen credit cards. *Williams* v. *New York*, 337

U.S. 241 (1949); *United States* v. *Trigg*, 7 Cir., 392 F.2d 860, 864 (1968), *cert. denied*, 391 U.S. 961; *Cross* v. *United States*, D.C. Cir., 354 F.2d 512, 514-515 (1965); *United States* v. *Doyle*, 2 Cir., 348 F.2d 715, 721 (1965), *cert. denied*, 382 U.S. 843.

Finally, it should be observed that Judge Decker imposed the same one-year sentence on each of the brothers Onesti, one of whom plead guilty and did not appeal. We find no grounds that would justify vacating the sentence and remanding the case for a reconsideration of sentence.

The judgment appealed from is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, June 17, 1969

Before

HON. JOHN S. HASTINGS, *Senior Circuit Judge*

HON. THOMAS E. FAIRCHILD, *Circuit Judge*

HON. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 17262 vs.
FRANK ONESTI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause, filed by the appellant herein, be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 455

FRANK ONESTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Northern District of Illinois of conspiracy with others to steal a letter containing a credit card and of a substantive violation of 18 U.S.C. 1702. He was sentenced to imprisonment for one year. The court of appeals affirmed the conviction.

The sole issue raised on appeal and in this Court is a claim that the judge considered impermissible matter in fixing sentence. The colloquy quoted by petitioner (Pet. 3-8) shows that the judge imposed a

one-year sentence (out of a possible maximum of five years on each count) because he was convinced that the violation charged was not an isolated transaction but one element of a broader scheme involving dealings by petitioner with a number of stolen credit cards. As the court of appeals noted (Pet. App. 3) the trial evidence as to the purchase of 18 to 20 credit cards stolen from the mail and evidence obtained under a search warrant amply justified such an inference.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1969.

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